> wedding gifts at the time of his wedding, *the way to prove it is from that witness stand, under oath . . . put on Mrs. Fernicola and just ask her one question . . . but that doesn't happen. That doesn't happen.*" (453-54a)
>
> ". . . Well, if he wants us to believe that Dr. Fernicola got money from Giano Merlo, *put Mrs. Fernicola on the stand to testify about it. . . .*" (454a). (Emphasis added.)

This Court said in its historic *Griffin* decision that

> "the Fifth Amendment, in its direct application to the Federal Government, and its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." 380 U.S. at 615. (Footnote omitted).

There can be no question but that the prosecutor's comments, both direct and indirect, in this case violated petitioner's constitutional right under *Griffin*. The Court of Appeals for the Third Circuit, apparently deeming the violation of petitioner's rights to be "harmless," did not even resolve the *Griffin* question in its opinion, the court simply stating (per curiam) that "other points presented by appellant with respect to alleged errors at the trial do not merit discussion." (Pet., Appendix B, p. 14).

Petitioner respectfully submits that the Third Circuit in this case has done indirectly precisely what the Supreme Court of California did directly in *Chapman* (and in *Wheaton, supra,* which raises the same question as *Chapman*), i.e., the court has applied a relative "harmless error" standard to what should be an absolute constitutional right. Petitioner has been denied a fundamental constitutional right and the only way for

the denial to be redressed is through the grant of this petition for rehearing and a determination by this Court on the merits.

It is almost impossible to fully appreciate at the appellate level the pernicious effect the prosecutor's comments had on petitioner's case. The trial was a long and somewhat bitter one and, as the Government admitted in its brief in opposition, "doubtless a certain amount of acrimony did creep into this trial." (p. 8). Moreover the government's theory of guilt was built upon a "net worth" approach whereby its case developed on the basis of testimony from persons other than the taxpayer. The fact that there were many disputes between counsel on matters such as how much was paid for certain items, who paid for them, etc., placed the minds of the jurors in a perfect posture for the adverse inferences which the prosecutor tried to elicit by his references to the failure of petitioner and his wife to testify. The natural reaction of the jurors to the prosecutor's summation would be "Yes, why doesn't the defendant or his wife get on the stand and explain these things to us?"

Unless this Court speaks out on the practical application of *Griffin* to federal courts, it is submitted that government attorneys will be able to undermine this decision by resorting to the more subtle and indirect comments on a defendant's failure to testify such as are present here. Part and parcel of the implementation of this right on the trial level is the question of effective review in the courts of appeals. Since it is such a difficult task for an appellate court to ascertain precisely what prejudice a prosecutor's comments might have upon a defendant's right to a fair trial, the right to be free from adverse comment should be

made absolute as to both federal and state trials. It is only through such a drastic approach that United States Attorneys and state prosecutors will realize that resort to prejudicial comments on a defendant's failure to testify will avail them nothing. Reversal should follow automatically without the necessity of *ex post facto* inquiry into the degree of prejudice caused by the comments.[2]

CONCLUSION

WHEREFORE, Petitioner respectfully prays that the petition for rehearing be granted.

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[2] Such an approach was, in effect, adopted by the Fifth Circuit in *Davis* v. *United States*, 357 F.2d 438 (1966) (*Petition for cert. filed* on other grounds than comment question No. 245, O.T., 1966). There, the trial judge commented that defense counsel could "put your people" on the stand rather than impeach the Government witness. The appellate court commented:

> "We can think of no effect of the trial judge's comments other than to invite the jury's attention to the fact that [defendants] had not taken and did not take the witness stand. Here, no one but [the defendants] could have contradicted the Government's witness as to the events about which he had testified and upon which he was being cross-examined at the time of the trial judge's remarks." 357 F. 2d at 441.

In so deciding, the court specifically analogized comments by the court to comments by a prosecutor, finding such comments wrong from either source. *Id.* The decision of the Third Circuit in the instant case appears to be clearly in conflict with the Fifth Circuit's *Davis* decision (a fact which petitioner did not call to this Court's attention in his petition or reply Brief).

CERTIFICATION

I, Albert H. Greene, attorney for petitioner do hereby certify that this petition is presented in good faith, not for delay, and is restricted to such grounds as are encompassed by Rule 58 of this Court's Rules.

ALBERT H. GREENE